United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 75-7332

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7332

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, *Plaintiff-Appellee,*

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION and BURLINGTON INDUSTRIES, INC., *Defendants-Appellants.*

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT BURLINGTON INDUSTRIES, INC.

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INTRODUCTION AND SUMMARY

Logic and reason may not be distinguishing hallmarks of conspiracies in restraint of trade, as plaintiff-appellee suggests, but the conspiratorial scenario presented in plaintiff's 137-page brief is so contrived that reasonable men could not possibly conclude—save by resort to uninformed speculation—that defendant-appellant Burlington Industries, Inc. participated in a conspiracy with Clark-Schwebel to drive Textura out of business. There is, of course, no

claim of any direct evidence of Burlington's participation in such a conspiracy, and plaintiff relies solely upon implications allegedly arising out of the circumstances of Burlington's sales and credit transactions with Textura during the "conspiracy period" (March 1 to December, 1966).

The law is settled that:

> The circumstances surrounding a particular course of conduct may justify an inference of collusion even though there is no evidence of the acts by which the conspiracy was formed. There is a limit, however, to the degree of indirection and innuendo which the law will tolerate. Where, as here, the plaintiff's case is based entirely on such circumstantial evidence, the Court must be especially vigilant to insure that liberal modes of proof do not become the pretext for unfounded speculation. (*Overseas Motors, Inc.* v. *Import Motors Ltd., Inc.*, 375 F.Supp. 499 (E.D.Mich. 1974), *aff'd*, 1975 Trade Cas. ¶ 60,340 (6th Cir. 1975).)

The court below exercised no such vigilance and allowed a case to go to the jury that invited rampant speculation and guesswork.

Moreover, plaintiff's obscure brief—like the district court's opinion before it—provides no aid in understanding precisely what circumstances plaintiff claims give rise to implications of Burlington's participation in a conspiracy. The technique of the brief is simply to *assume* the existence of a conspiracy (*e.g.*, Tex. Br., pp. 47-48),[1] to superimpose upon that assumption a melange of complicated business dealings (Tex. Br., pp. 19-41) and then to conclude that from all this plaintiff had made out a "classic conspiracy" (*id.*, at p. 64).

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[1] "Tex. Br." as used herein refers to the brief filed on October 30 by plaintiff-appellee. "Burl. Br." refers to the opening brief filed by defendant-appellant Burlington Industries, Inc. on September 24, 1975. To avoid repetition, citations to our main brief in the present reply incorporate by reference the record citations contained in the cited pages of the main brief.

A typical example of plaintiff's conclusory and circular reasoning is its claim that a conspiracy was evidenced by defendants' unique, similar treatment of Textura with respect to the latter's terms of credit, including the fact that both defendants warehoused fabrics for Textura (but not for other customers) for long periods of time without billing plaintiff for the goods until they were called out. At the very same time, plaintiff-appellee admits—as it must—that such "unique and similar credit arrangements" (Tex. Br., p. 20) resulted from Textura's own unilateral request to each defendant that such arrangements be provided (*id.*, p. 14, note).

Expectedly, Textura accuses defendants of trying to compartmentalize the "conspiracy" by discussing various issues under certain descriptive headings in our briefs (*e.g.*, "parallel conduct", "motive", "threats", etc.). Obviously, however, appellants' entire case cannot be stated in a single sentence, and in an effort to present that case in an orderly manner we discussed the cryptic reasons advanced by the district court in sustaining the verdict under headings corresponding with the trial court's own labels.[2] Of course, plaintiff is not interested in such an orderly presentation of the "circumstantial evidence" relied upon, for it establishes Burlington's point that in the present case the whole was so much greater than the sum of its parts as to compel the conclusion that the verdict rests at best on suspicion or surmise.

Plaintiff also argues—typically—that defendants "raise no real question of law but seek to retry the case before

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[2] As the court said in United States v. L. D. Caulk Co., 126 F.Supp. 693 (D.Del. 1954)—from which plaintiff-appellee only partially quotes:

> While one should not, by attention to specific actions or isolated conditions, fail to see the overall picture [of a conspiracy], yet the component parts cannot be ignored, for without these component parts there is no "panorama" or overall picture at all (126 F.Supp. at 698).

this Court . . ." (Tex. Br., p. 45). To the contrary, the rule of law we squarely raise is the one clearly enunciated in the many cases cited and discussed in our opening brief (*e.g.*, Burl. Br., pp. 18, 37-41), most of which, including this Court's recent decision in *Modern Home Institute, Inc. v. Hartford Accident & Indem. Co.*, 513 F. 2d 102 (2d Cir. 1975), plaintiff simply ignores.[3] This rule is that if possible implications of conspiracy in evidence of business conduct are fully rebutted by *undisputed* evidence that the acts relied upon are consistent with the business self-interest of the actor on a theory of independent behavior—*i.e.*, the business action likely would have been taken in the *absence* of agreement—then the trial court as a matter of law should not send the case to the jury.[4] Not only was it *likely* that Burlington would have taken the actions complained of by Textura in the absence of conspiracy, it in fact took these very actions (*i.e.*, requiring a personal guarantee and payment within 60 days) a full year before the "conspiracy" is alleged to have begun.

The district court's failure to grasp these basic issues is revealed in the treatment of the "hypothetical" posed by the jury in one of the many questions sent out from the jury room during the five days the jury struggled to under-

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[3] See also Venzie Corp. v. U.S. Mineral Products Co., 1975 Trade Cas. ¶ 60,481 (3d Cir., September 22, 1975): "The absence of action contrary to one's economic interests renders consciously parallel business behavior 'meaningless, and in no way indicates agreement . . .', Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655, 681 (1962)." 1975 Trade Cas. ¶ 60,481, at p. 67,136.

[4] Such a rule does not involve improper resolution by the trial judge of factual questions properly within the province of the jury. Trial judges regularly make threshold determinations as to the reliability, probative nature and relevance of evidence of claimed conspiracy, and whether evidence invites speculation by the jury falls squarely within this category of traditional preliminary court rulings. See cases cited at Burl. Br., pp. 18, 37-41.

stand the court's charge on the law of conspiracy. Thus, the jury asked (App. 1258):

> Company X is telephoned by Company Y and tells Company X he (Company Y) is holding up credit on Customer A. Y also tells Company X that Company Z is holding up credit on Customer A. And actions followed that two out of the three companies at the same time period modified their credit arrangement. Is this a conspiracy?

The clear answer to this question under the ruling of the Supreme Court in *Cement Mfrs.' Protective Ass'n* v. *United States*, 268 U.S. 588 (1925)—not discussed by plaintiff-appellee—is "No." Yet Chief Judge Edelstein, presiding upon the disappearance of Judge Tenney from the court, erroneously told the jury it was for them to decide whether such evidence made out a conspiracy (App. 1259).[5]

In the remainder of this reply, we will summarize those circumstantial evidentiary propositions apparently relied upon by plaintiff as establishing a "classic" restraint of trade during the "conspiracy" period (March 1 to December, 1966). We also summarize what the undisputed, unrebutted evidence shows as to Burlington's acts and practices during this period.[6] This comparison, we submit,

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[5] Plaintiff's only response to our contention that it was highly prejudicial for the judge who presided at the trial not to be available to provide guidance to a confused jury is to charge us with an unprofessional personal attack on Judge Tenney. There is no dispute, however, that Judge Tenney totally abandoned the case after submitting it to the jury, and relied upon either counsel themselves or Chief Judge Edelstein (when available) to answer the numerous questions asked by the jury.

[6] Recognizing that this evidence destroys the conspiratorial implications relied upon, plaintiff-appellee argues (Tex. Br., p. 45) that it consists in the main of hearsay statements contained in business memoranda prepared by Burlington employees. The memoranda in question, however, were contemporaneous records, which were not prepared in contemplation of litigation, which were main-

compels application of either or both of two related legal principles which require reversal of the result below: (1) where the business conduct of two or more defendants, relied upon as circumstantial evidence of concerted action, not only is not similar, but in fact is antithetical, no inference of conspiracy is permissible; (2) where business conduct, even if similar, is shown by undisputed evidence to be consistent with the business self-interest of the actor on an hypothesis of independent, non-conspiratorial behavior, no inference of conspiracy is permissible. We also reply briefly to plaintiff's argument that it made a clear showing that defendants' actions caused the destruction of the business of Textura.[7]

A. THE "CONSPIRATORIAL" TRANSACTIONS RELIED UPON BY PLAINTIFF RAISE NO IMPLICATION THAT BURLINGTON ACCEPTED AN INVITATION TO PARTICIPATE IN A CONSPIRACY

Plaintiff's theory appears to be that defendant-appellant Clark-Schwebel in contacting Burlington's Credit Department during the conspiracy period was inviting Burlington to join it in a conspiracy to drive Textura out of business. As noted, plaintiff at no place in its brief sets out any facts (circumstantial, inferential or otherwise) showing Burlington's awareness of any such plan on the part of Clark-Schwebel (assuming the existence of such

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tained in the normal course of Burlington's business, and which were admitted into evidence as business records both by Judge Tenney and by Chief Judge Edelstein (before whom plaintiff's counsel renewed and reargued their hearsay objections to these written records following Judge Tenney's disappearance from court and notwithstanding his prior ruling that they were admissible as business records).

[7] Additional arguments in the separate reply brief filed by defendant-appellant Clark-Schwebel Fiber Glass Corporation are adopted herein by reference.

plan).[8] Certainly the various credit contacts themselves—all of which plaintiff admitted at trial were perfectly legitimate—show no such communication. We have described each of these contacts in detail in our opening brief (Burl. Br., pp. 42-44) and plaintiff does not dispute the accuracy of that description. These communications in fact show a generally conciliatory attitude by Clark-Schwebel toward Textura and a desire to work with the customer if possible.

Nor is there a shred of evidence of any kind that Burlington ever accepted any such invitation, assuming, contrary to the facts, that it was ever extended.

Preliminarily, we refer briefly to plaintiff's argument that it was unnatural and suggestive of conspiracy for any supplier of Textura (including Burlington) to be concerned about Textura in early 1966 since during this period of time, according to Textura's internally prepared (but *unaudited*) financial statements, the company was experiencing the greatest prosperity in its history. This totally overlooks the following undisputed facts:

First, Textura's monthly, internal, unaudited statements were totally unreliable (indeed, deliberately misleading) since Mr. Powrie admitted on cross-examination that as to "all these [unaudited] statements" (Tr. 804, R. 273; App. 585-86) he instructed his bookkeeper to keep the books open beyond the normal closing period until a certain level of

[8] Plaintiff-appellee makes much of the testimony of Clark-Schwebel's Mr. Nordheim (apparently deemed an "admission" by the district court) that he contacted Burlington's Credit Department more frequently following initiation of Clark-Schwebel's arbitration suit against Textura "to protect" himself (App. 867-68). But, as pointed out in our opening brief, even if the jury could properly stretch this bit of ambiguous testimony into an "admission" that Mr. Nordheim was trying somehow to enlist Burlington in a conspiracy, Burlington's acceptance of the invitation and its participation therein would have to be established, and this plaintiff wholly failed to do.

sales could be recorded. Such repeated borrowings against future sales simply caught up with Textura, for instance, in connection with the June 1966 financial statements in which Mr. Powrie, over his outside accountant's objection, wanted to include a $66,000 sale (the so-called Del Webb contract) on which work had not even commenced.

Second, on the basis of the *audited* year-end statements for 1964 and 1965 Textura showed total losses approaching $150,000 and substantial *deficit* working capital, the typical measure of a firm's ability to pay its bills.[9] Indeed, at the end of 1964, Textura was in a state of insolvency, which led to Burlington demanding and obtaining in April of 1965—a non-conspiracy year—Mr. Powrie's personal guarantee that Textura's accounts to Burlington would be paid. Parenthetically, we note that the district court ruled that efforts by Burlington to get a renewal of the personal guarantee in 1966 (following further losses and additional deficit working capital at the end of 1965) were contrary to Burlington's business self-interest and were explicable only on a theory of conspiracy with Clark Schwebel and others. We submit that this is erroneous on its face. Significantly, plaintiff's 137-page brief does not purport to defend such a ruling and devotes but a single sentence to the district court's statement that Burlington acted contrary to self-interest. In that single sentence (Tex. Br., p. 64), plaintiff merely restates the district court's conclusion that defendants acted in contradiction to their self-interests, but Textura does not even attempt to support this perfunctory conclusion.

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[9] While Mr. Powrie testified that Textura was poised at the end of 1965 for a great leap forward in 1966 into the national market, Mr. Allen Friedman, the management expert brought in for one year in 1965 to prepare Textura for such expansion, ended his efforts in December 1965 by effecting a large reduction in Textura's work force (App. 962). It is absurd to suggest that the virtually insolvent Textura was going to make a substantial penetration of the national decorative fiber glass market in 1966.

Here is the sum and substance of the evidence of Burlington's participation in a conspiracy as spelled out in plaintiff's brief, to which we briefly reply under appropriate headings below:

Burlington for four years had received complaints from other customers about the way Textura did business (although there is no claim that any other customer ever asked Burlington to take action against Textura). In early 1966 Textura made a substantial quality claim against Clark-Schwebel, as a culmination of which dispute Clark-Schwebel on March 1, 1966 placed Textura on a cash basis and prepared to file an arbitration suit against Textura for some $90,000 allegedly due and owing, and as part of a regular practice of exchanging credit information informed Burlington's Credit Department of these actions on or before June 8, 1966.[10]

Following receipt of this and other information pertaining to the status of the arbitration, Burlington continued its prior policy of trying to get Textura to pay its bills more promptly, sought another personal guarantee from Mr. Powrie for the year 1966, told Mr. Powrie that unless

[10] In our opening brief, we show that the written contemporaneous records of these events established that Burlington did not learn of Clark-Schwebel's March 1, 1966 decision until June 8, 1966, although, as plaintiff stresses (Tex. Br., p. 57), Powrie had previously told Burlington's sales personnel he was having quality problems with Clark-Schwebel on a certain job and was getting the "run around." We also show that Burlington's credit and sales decisions were implemented far in advance of this date (in April, 1965—a year before the "conspiracy" began in March, 1966—when Burlington required and received Mr. Powrie's personal guarantee as a condition to extending further credit *and* his commitment to work toward payment within 60 days). Plaintiff-appellee simply ignores this critical fact. In light of this undisputed circumstance, whether Burlington learned of Clark-Schwebel's March 1, 1966 action at or about the time it was taken—a question discussed at great length in plaintiff-appellee's brief—is largely immaterial.

the Clark-Schwebel arbitration proceedings were settled on a basis permitting Textura to pay its bills, Burlington probably would not be able to extend Textura an unlimited line of credit, and delayed weaving certain new Textura orders.

From these routine business transactions, plaintiff claims, Burlington's participation in a "classic conspiracy" is established.

1. The Credit Communications

Apparently, plaintiff concedes that the credit exchanges of record themselves contain no evidence of conspiracy. It argues, however, that there *must* have been other communications between defendants and that these other unproven communications probably evidence unlawful agreements. Thus, plaintiff argues that since Nordheim testified he "regularly" exchanged credit information with Kelley (head of the Burlington Credit Department), the jury could have inferred that he communicated with Burlington in or about March, 1966, when Clark-Schwebel put Textura on a cash basis (see Tex. Br., p. 57). Plaintiff then goes on to argue, based on this "inference", that the jury could have further "inferred" that these unproven communications consisted of conspiratorial arrangements and agreements and, further, that the jury could have "inferred" that Burlington based its actions on these assumed agreements. See Tex. Br., at pp. 49, 51-52, 53-54, 57-58.

Plaintiff's entire argument reveals that the verdict below is based on a pyramid of inference upon inference. The law is well settled, however, that where a jury verdict rests on such a basis, a reviewing court must reverse the judgment entered on that verdict. As stated by the Supreme Court long ago (*United States v. Ross,* 92 U.S. 281, 283-84 (1876)):

> These seem to us to be nothing more than conjectures. They are not legitimate inferences . . . they are inferences from inferences; presumptions resting on the

> basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain.

See also *Tyrrell* v. *Dobbs Investment Co.*, 337 F.2d 761, 765 (10th Cir. 1964).

In short, the only credit exchanges in evidence are perfectly lawful (as the district court and even plaintiff conceded) and plaintiff's present argument that there *may* have been other unlawful exchanges not in evidence must be rejected. See *Venzie Corp.* v. *U.S. Mineral Products Co.*, *supra*, 1975 Trade Cas. at p. 67,135 (". . . [A]n opportunity [to conspire] is significant only if other evidence permits an inference that an agreement did in fact exist.").

2. Burlington's Alleged Motive

The matter of Burlington's imagined desire to destroy Textura is discussed fully in our opening brief. Plaintiff-appellee's only response is to the effect that the jury may not have believed Mr. Vollers' testimony that while he received complaints (or "gripes") from other customers about Textura over a four-year period, neither he nor anyone else in Burlington ever took any action against Textura as a result thereof and that these complaints were disposed of "on the basis of a logical explanation of the conduct of our business" (App. 904).

In the first place, the testimony of Mr. Vollers (who at the time of trial was no longer a Burlington employee and clearly had no incentive to prevaricate) squares precisely with that of Mr. Powrie, who testified that he, too, received such complaints from the same sources (App. 356):

> . . . [T]hrough the years it was something we lived with . . . it did not divert us because we were not interfering with that type of business. It was a new business that we created. The fabric could not have been sold if we had not sold it.

This was the same "logical explanation" given by Mr. Vollers when he received such complaints.

Moreover, it is well settled that the possibility of disbelief does not constitute substantial evidence. As the district court stated in *Hallmark Industry* v. *Reynolds Metal Co.*, 1971 Trade Cas. ¶ 73,409, p. 89,667 (N.D.Cal. 1970), *aff'd*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974):

> The jury did not have to believe the testimony of Hall, Fox, Kibbey, or of any other witness for defendants Reynolds and Stanray. Mere disbelief, however, does not in and of itself, rise to the level of positive proof in the absence of other competent evidence suggesting alternative possibilities. *Dyer* v. *MacDougall*, 201 F.2d 265 (2d Cir. 1952); *Davis* v. *National Mortgagee Corp.*, 349 F.2d 175 (2d Cir. 1965).

See also, *Venzie Corp.* v. *U.S. Mineral Products Co.*, 1975 Trade Cas., *supra*, at p. 67,135.

Plaintiff-appellee points to no alternative possibility here, and there is none.[11]

Finally, that Burlington continued to do business with Textura (and on credit) for a period of at least four years after receiving such complaints totally undercuts plaintiff's hypothesis that Burlington was anxiously awaiting an opportunity to eliminate Textura to protect its larger, more important customers. Indeed, this was the precise holding of *Scott Medical Supply Co.* v. *Bedsole Surgical*

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[11] Textura argues that a company known as "Soft Flex Fabrics, Inc." was formed by certain co-conspirators (including an independent sales representative of Burlington, Mr. Erskine) to distribute fabrics "in the traditional method" (Tex. Br., pp. 22-23) and suggests that Burlington was involved in the founding of this enterprise (see Tex. Br., p. 47). The trial court ruled, however, that there was no evidence showing that Soft Flex or its principals were involved in any way in a conspiracy with defendants (App. 980; Tr. 1883, R. 275). Plaintiff's efforts to resurrect the Soft Flex issue--ruled out of the case by the trial court—must be rejected.

Supplies, Inc., 488 F.2d 934 (5th Cir. 1974), discussed in our opening brief but not referred to by plaintiff-appellee.

3. The Claimed "Similar" Restrictions of Credit

Plaintiff seems now to concede the error of the district court's ruling that the credit actions of Burlington and Clark-Schwebel were sufficiently identical or parallel to permit an inference of conspiracy, for Textura argues that its failure to prove conscious parallelism was of no consequence since (Tex. Br., p. 63):

> [T]his is not, as defendants would have us believe, a typical group boycott . . . in which the plaintiff's primary proof of conspiracy is the evidence of the defendants' conscious [sic] parallel acts.*

* Nor as defendants seem to imply is conscious parallelism a prerequisite to a finding of a conspiracy . . . .

In any event, plaintiff totally fails to refute the undisputed evidence that Burlington's basic credit and sales decisions (to obtain Mr. Powrie's personal guarantee and to work towards prompt payment, *i.e.*, within 60 days) were formulated and expressed to Mr. Powrie as early as April of 1965, a full year before the alleged conspiracy began. See Burl. Br., pp. 23-27. Indeed, Textura seems to concede that these policies of Burlington were lawfully formulated, but argues that they somehow became unlawful when they were continued after Clark-Schwebel's March 1, 1966 actions. How such lawful actions became illegal is not explained.

As for the alleged statement of Mr. Schutz concerning settlement of the Clark-Schwebel arbitration, all concede (including Mr. Powrie and his own accountant), that an arbitration of that size would "naturally" be of concern to Burlington as a creditor-supplier and the expression of this natural concern to Mr. Powrie gives rise to no inference of "orchestration" (to use plaintiff's term) with Clark-Schwebel.

Finally, in regard to the delay of credit approval of the new Crown and Satin Boucle contracts in about April of 1966, we demonstrated in our opening brief that this occurred more than two months before Burlington learned of Clark-Schwebel's actions, that Mr. Powrie was personally informed of the action at the time (when he was "stalling" on the matter of renewal of the personal guarantee), and that in fact the contracts subsequently were accepted and woven.[12] Even if it is assumed that Burlington knew of the Textura-Clark-Schwebel dispute as of March, 1966, a decision to delay commitment for further special goods for Textura's account (App. 1891) was completely in Burlington's business self-interest on a theory of independent behavior.

4. The Matter of the Personal Guarantee

Plaintiff argues it was a "reasonable inference" that Burlington requested a personal guarantee from Mr. Powrie in 1966 and allegedly "threatened to terminate Textura's credit" as part of a conspiracy with Clark-Schwebel (Tex. Br., pp. 53-54). But the record shows by undisputed evidence that Burlington had been requesting Powrie's guarantee throughout the years of their business relationship, had put Textura on a cash basis in 1964 when Mr. Powrie refused to provide a guarantee, had obtained his personal guarantee following staggering losses at the end of 1964, had been seeking a renewal of that guarantee since January 5, 1966 (just after the expiration of the 1965 guarantee), and had repeatedly attempted to obtain renewal of the guarantee throughout the first half of 1966. See Burl. Br., pp. 12-13, 22-29.

Plaintiff's sole argument in response to this unrebutted evidence is as follows: "[W]hatever the status of the demand for the guarantee prior to the communications from Clark-Schwebel, subsequent to these communications, it

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[12] Burl. Br., pp. 27-31.

was expressly tied to Textura's settlement of the arbitration with Clark-Schwebel'' and, therefore, the request for a guarantee supported an inference of conspiracy (Tex. Br., p. 54). This is nothing more than argument and pure speculation both on its face and in light of the undisputed facts that: (a) Burlington never changed its policy of insistence upon Mr. Powrie's guarantee (Burl. Br., at p. 23, *et seq.*); (b) the only communications that ever occurred were entirely lawful credit communications (*id.*, at pp. 41-45); and (c) as Mr. Powrie himself testified and as his accountant and expert witness agreed, the subjects of these communications (and a dispute the size of the Clark-Schwebel arbitration) would certainly and naturally be of concern to Burlington as a supplier to and creditor of Textura (*id.*, at pp. 14, 28-29, 44, 51). Plaintiff's "inference'' that Burlington's policy of continued insistence upon Powrie's personal guarantee was the product of a conspiracy is completely unfounded.

5. Alleged Refusal To Weave Certain Fabrics

Finally, plaintiff argues "[i]t was equally a permissible inference'' for the jury to find conspiracy from Burlington's "change of mind'' about weaving the fabric Morro (formerly manufactured for Textura by Clark-Schwebel) after Burlington learned of Clark-Schwebel's dispute. See Tex. Br., p. 55. Here, again, there is no evidence to support such a conclusion and, in fact, the record demonstrates that plaintiff is engaging in pure fabrication of "facts''. The record shows that there was no such "change of mind'' by Burlington. Rather, Powrie's own testimony shows that Burlington *did* weave a sample of Morro for Textura, and Mr. Powrie himself subsequently lost interest in it and never submitted an order for the fabric, which was the practice with respect to new weaves. See Burl. Br., pp. 32, 36; App. 405.

Moreover, plaintiff conveniently overlooks the fact that Burlington during the very heart of the conspiracy and at

Textura's request wove 25,000 yards of another fabric (Homespun) formerly woven by Clark-Schwebel. Similarly, as discussed in our main brief, plaintiff's argument that quality problems experienced by Burlington in 1966 "strongly underscore the inference of agreement" (Tex. Br., pp. 55-56) is simply untenable in light of Mr. Powrie's admission that on every single occasion that Textura complained of quality problems, Burlington made full and satisfactory adjustments (either in cash or by accepting the return of the fabric) even during the last few weeks of Textura's existence. See Burl. Br., at pp. 32, 35-36.

B. Burlington's Acts Were Antithetical to the Existence of a Conspiracy with Clark-Schwebel

We demonstrated in our original brief that the actions of Burlington and Clark-Schwebel not only were not parallel, but generally were antithetical and at cross purposes with each other (See Burl. Br., pp. 21-23, 30-34). Thus, after carefully stating the undisputed evidence of record (*id.,* pp. 31-32), we summarized the facts as follows (*id.,* pp. 32-33):

> Clark-Schwebel refused to sell to Textura on credit after March 1, 1966, but Burlington continued to offer 60-day terms; Clark-Schwebel refused to ship on existing contracts except for cash after March 1, 1966, but Burlington continued to ship on 60-day terms; Clark-Schwebel billed Textura on March 1, 1966 for all goods Clark-Schwebel was holding in its warehouse, but Burlington continued to give Textura additional time to call out goods Burlington was holding; Clark-Schwebel at all times failed to make quality adjustments, but Burlington continued to make full and satisfactory adjustments throughout Textura's existence; Clark-Schwebel refused to weave new fabrics for Textura after March 1, 1966, but Burlington agreed to and did weave new fabrics, including two fabrics formerly woven by Clark-Schwebel.

Plaintiff does not dispute the accuracy of this summary. Its sole response is to state that the case of *Delaware Val-*

ley Marine Supply Co. v. *American Tobacco Co.*[13] "should be dispositive of defendants' contention that their actions in restricting the conditions of sale to Textura were not sufficiently uniform" (Tex. Br., p. 65). First, plaintiff fails to mention that in *Delaware*, while there *was* uniform conduct, the Court of Appeals ruled that any conspiratorial implications therein were fully rebutted by undisputed facts of record showing that each defendant acted in its own independent business interest (297 F.2d, at 205) *and a directed verdict for defendants was affirmed*. Also, dictum in the *Delaware* case relied upon by Textura related to the Court's statement that differences in the *manner* of rejecting plaintiff's application to purchase goods was not dispositive since "there was a uniformity of action on a crucial point: all the corporate defendants denied the plaintiff's application" (297 F.2d at 204). In the present case, however, defendants' actions not only were not uniform, they did not even take the same direction and were fundamentally antithetical to each other and hence to the existence of any conspiracy. Thus, while Clark-Schwebel put Textura on cash terms, demanded that all goods in inventory be called out, failed to make quality adjustments, etc., Burlington at all times continued to extend credit, always made satisfactory quality adjustments, never withdrew Textura's warehousing privileges, and agreed to and did weave new fabrics during the "conspiracy", some of which were formerly woven by Clark-Schwebel but which the latter refused to continue weaving because of its dispute with Textura.

Here is what Burlington did during the very heart of the alleged conspiracy:

(1) Shipped fabrics to Textura in record quantities during the first six months of the "conspiracy" (March through August, 1966) (App. 1645).

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[13] 297 F.2d 199, 204 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

(2) Continued to extend 60-day credit terms and to allow Textura to leave goods in Burlington's warehouses until called out (with the 60-day terms starting to run only when the goods were called out) (App. 1891, 1578, 1537, 556).

(3) Accepted orders for Homespun and Morro (formerly woven by Clark-Schwebel) on May 11, 1966, and wove about 25,000 yards of Homespun during the conspiracy period (App. 1867, 1537, 423).

(4) Accepted and wove orders for new Textura styles known as Mystique and New Vista (App. 1867, 1895, 1537).

(5) Wove a total of about 85,000 yards of fabric styles specially for Textura's account on which a loss would have been realized if the goods were not purchased by Textura (App. 1891, 1895, 1537).

(6) Accepted new contracts for Crown and Satin Boucle in August of 1966 (App. 1537, 1895; Tr. 2108, R. 275).

(7) Decided to extend further credit to Textura for the last quarter of 1966 and part of 1967 (App. 1537, 1809, 1895).

(8) Took back at no cost to Textura about 25,000 yards of allegedly defective merchandise (App. 511-12).

(9) Cancelled, at no cost to Textura, another contract for fabric Textura did not want (App. 1809, 511-12).

(10) Continued to ship fabric in the "greige" or "unfinished" state to Textura so the latter could utilize its own West Coast finisher which could finish fabrics in runs of 1,000 yards or less (whereas a standard mill run by Burlington was about 3,000 yards) (App. 412, 1891).

(11) Deferred on the matter of the personal guarantee and decided to go ahead without it if Textura would pay its bills within the promised 60-day terms (App. 1889, 1893, 1894, 1537).

(12) Wound up with about 85,000 yards of goods in inventory woven for and confined to Textura's account (App. 1791).

(13) Suffered a loss of about $20,000 when Textura went into bankruptcy (App. 1578).

We stress that all of the above occurred during the very middle of the claimed conspiracy when Clark-Schwebel was shipping nothing to Textura and had revoked all prior sales and credit terms. This is exceedingly strange behavior for Burlington to engage in if it were participating in a conspiracy to drive Textura out of business. The jury verdict for Textura cannot stand in the face of these undisputed facts.

C. Nothing Burlington Did Caused Textura's Bankruptcy

As noted above, plaintiff's principal theory of causation, as alleged in the complaint, was that defendants induced L. F. Dommerich, Inc. to terminate a factoring agreement with Textura pursuant to which Dommerich purchased most of Textura's accounts receivable and without which arrangement Textura would not have the cash with which to pay its bills. This theory was vigorously pursued at trial, with Mr. Powrie testifying that on August 10, 1966, he was informed that Dommerich was cancelling the agreement effective October 10, 1966. Powrie testified further that in July and August of 1966 Dommerich, in preparation for the termination, and to cover itself against uncollectible invoices, was withholding more than $85,000 of Textura's money. Mr. Powrie described the result of that cash reserve as follows (App. 466-67):

". . . [W]e didn't have cash to operate with."

The trial judge held, however, that there was no evidence that Dommerich had participated in any conspiracy with defendants. *Plaintiff has never disputed the correctness of that ruling.* We argued in our main brief that this termi-

nation and the attendant cash reserve was the real cause of Textura's financial difficulties in 1966.

Plaintiff's response is simply to pretend that the termination and cash reserve did not happen. Thus, Textura argues that in fact Dommerich continued to factor Textura's invoices as late as December of 1966. Textura fails to point out, however, that this arrangement was on a month-to-month basis and that Dommerich continued to build up its cash reserve, advancing only about 50% (rather than the customary 90% or more) on invoices factored (App. 1527). It seems perfectly clear that Dommerich's non-conspiratorial actions were the real cause of Textura's troubles in 1966, just as Mr. Powrie himself testified.[14]

Nor has plaintiff rebutted our contention that the lack of fabrics from defendants could not have been a material cause of Textura's failure. In fact, Textura's brief merely emphasizes the *de minimis* effect any such lack of fabrics may have had on plaintiff's constantly tottering enterprise. Thus, plaintiff expressly admits that the only *firm* contracts it had which could not be filled due to a lack of fabric totalled only $5,500 (Tex. Br., p. 75). We stated in our main brief that "[i]t simply is inconceivable that the loss of $5,000 of sales could substantially have injured Textura [a company with sales exceeding $1,000,000 annually] or contributed to its going out of business, notwithstanding the financial thinness of the company" (Burl. Br., p. 56).

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[14] Textura also claims both conspiratorial inferences and causal relation arise from the fact that there were no shipments of fabrics from Burlington during September, 1966. But as Powrie testified, due to Dommerich's huge cash reserves Textura had no money with which to buy fabrics. Also, in September Textura had large and increasing inventories of fabrics (Burl. Br., p. 54), many of which were obtained from non-defendant suppliers (Tr. 861-62). Moreover, as Mr. Vollers, formerly of the Burlington sales department, testified, he always shipped goods to Textura when he "got a request from the customer" (Tr. 1626, R. 274).

In response, plaintiff attempts to pad those figures by listing $39,175 in sales on "contracts which Textura had outstanding in 1966" (Tex. Br., p. 76). However, as we also pointed out in our main brief, these figures relate entirely to contracts on which installation was not even scheduled to begin until 1967 (Burl. Br., p. 56). Clearly, non-performance by Textura on these 1967 contracts had no causal relation to Textura going out of business in 1966.

Next, Textura attempts to prove causation by listing $51,700 worth of "jobs" which it could not "finalize" due to defendants' actions. Then, however, plaintiff frankly admits—in a footnote—that by use of the term "jobs" it "refers to *potential* contracts" on which Textura made bids and on which it was not even assured of receiving any contract (Tex. Br., p. 76, note) (emphasis added). See Burl. Br., p. 57.

Continuing its search for credible evidence of causation, plaintiff lists $59,150 of "probable" sales, where no particular fabrics were specified (Tex. Br., p. 77). Plaintiff fails to point out that since these "probable" sales could have utilized any fabric, plaintiff could have fulfilled these by drawing from its own existing inventories of more than $180,000 worth of fabrics. See Burl. Br., p. 54. The fact that plaintiff is reduced to relying on these admittedly contingent and possible "jobs" and the fact that plaintiff chose to go out of business rather than to make these sales using its own large inventories, requires the conclusion that defendants' actions did not cause Textura's business failure.

CONCLUSION

For all of the above reasons, and for the reasons set out in defendants-appellants' opening briefs, the judgment below should be reversed with instructions to enter judgment for defendants notwithstanding the verdict. In the alternative, for the reasons stated principally in the separate

brief of defendant-appellant Clark-Schwebel, a new trial should be granted.

Respectfully submitted,

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November 13, 1975